Articles

The European Court of Human Rights: Yesterday, Today and Tomorrow

*By Mr. Justice John Hedigan**

A. The Past

I would like to address the European Court of Human Rights (ECtHR) from the perspective of its past, its present and its future. Where did this institution come from and why? It was the first Court to provide the opportunity to an individual to sue his government before an international tribunal although the initial expectation was that it would be State parties that policed each other under the system established. Why such a radical innovation and to what purpose? Why should State parties create a stick with which they themselves might be beaten?

The answer I think is to be found in the historic context of the late 1940s. In the 1920s, 1930s and 1940s the growth, triumph and collapse of the fascist regimes notably of Germany and Italy and the triumph of the communist dictatorships in much of Eastern Europe had demonstrated all too horribly and graphically the fragility of civilized democratic institutions in the face of insidious, insistent and deliberate attack by forces within those countries. The inability of national institutions to protect these structures stood as a dire warning to the Western European democracies that the price of liberty really was eternal vigilance. But what shape should this vigilance take? Institutions at the national level had failed demonstrably. They continued to fail in the communist countries. It seemed clear that the protection provided for individual liberties at a national level was not sufficient and, as the 1920s and 1930s had clearly demonstrated, such protection was rather easily overcome. The usual approach by those seeking to disarm national protective systems for civil and political rights was largely based upon perceived threats to national security which justified restriction on certain critical rights by the government. Moreover, in the immediate post-war world as so many of the great cities of Europe fell behind the Iron Curtain, this threat to the democratic values for which so much had been sacrificed seemed to grow almost on a daily basis. The inability of the international community to restrain the development of the apartheid regime in South Africa was a further graphic demonstration of civil and political rights being subverted by a determined national movement.

Some form of supervisory protection at the international level seemed appropriate. Thus emerged the concept of a judicial structure that would provide at an international level a

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form of protective machinery to which the citizens of individual European countries might have recourse when their rights seemed threatened by their governments. It is somewhat ironic that at its formative stage a mechanism for filtering applications was considered essential to prevent the projected Court from being swamped by unmeritorious cases. This indicated how great the founders considered the need.[1] How greatly regretted is the later abolition of that same filtering body when that prediction was so graphically fulfilled during the last thirteen years since 1998.[2]

The Convention was signed, subject to ratification, on behalf of Ireland on 4 November 1950, the day on which it was adopted and opened for signature. It was ratified by Ireland on 25 February 1953. Few could have foreseen the enormous impact this new Convention would have, not only among the contracting parties, but far beyond. The Convention entered into force on the 3 September 1953 and over the intervening 57 years, has inspired similar conventions in the Americas, North and South, in Africa and elsewhere.[3] The Convention has been the model for many other such conventions and for bills of rights within the constitutions of a number of states. Since the Convention entered into force, a number of protocols thereto have been adopted by the contracting parties. Some of these protocols deal with purely procedural matters while others have added new rights to the Convention. Fourteen States including Ireland signed the Convention in 1950. As of today there are 47 contracting States creating a jurisdiction over more that 800 million people. From uncertain beginnings there has developed an elaborate system for the protection of human rights whose jurisdiction now stretches three quarters of the way around the globe from Greenland to the Pacific coast of the Russian Federation.

The structure for overseeing the implementation of the Convention was largely finalized in 1959 when the Court of Human Rights was finally established. This structure was a three headed one.

(i) The Commission of Human Rights;
(ii) The Court of Human Rights;
(iii) The Committee of Ministers of the Council of Europe.

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[1] For a more detailed account of the drafting history of the Convention, *see* ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS CHAPTER 4 (2011).

[2] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 11 May 1994, restructuring the control machinery established there by Strasbourg, (ETS No. 5) available at http://conventions.coe.int/treaty/en/treaties/html/155.htm (last accessed: 27 September 2011).

[3] *E.g.* African Charter on Human and Peoples' Rights, 26 June 1981, OAU Doc. CAB/LEG/67/3; American Convention on Human Rights, 22 November 2009, 1969 OAS Official Records OEA/ser.K/XVI/1.1, doc.65 rev.1 corr.1.

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This structure continued until 1998. Initially the Court and Commission had little work.[4] However over the half century of its existence, its gathering reputation resulted in a growth of applications so great that it was considered that a complete overhaul of the system was urgently required. Throughout the 1990s, work continued on draft Protocol 11 which was adopted and opened for signature on 11 May 1994 by Member States of the Council of Europe, signatories to the Convention. It provided for a complete restructuring of the protective system in Strasbourg. The existing Commission and Court of Human Rights disappeared. Their functions were taken over by a new permanent Court. The quasi-judicial functions of the Committee of Ministers under Article 32 of the Convention disappeared.[5] Thus the proposed human rights monitoring machinery for the Convention would rest with one unified structure, the new European Court of Human Rights (ECtHR). The Committee of Ministers would continue to exercise their function of supervising the execution of judgments of the Court under Article 54 of the Convention.

Following final ratification by Italy in 1997, the new structure came into existence on 1 November 1998. The election of most of the judges of the new Court was achieved by the end of January 1998. Those judges elected then had to wait until November before being transmuted into full judicial status. Towards the end of this shadow period I recollect moaning to one of my colleagues at the Bar that I was getting much less work than before because all the solicitors knew I was leaving. She memorably observed, "Forgotten, but not gone."

Interestingly, it transpired that one third of the new Court consisted of former judges, one third former members of the Commission and one third newcomers. I do not know if this was by design but it was certainly fortuitous. It helped preserve the institutional memory of the former Court and Commission. I formed one of the third hardy band. I was assigned to the third section and, I think like most of my colleagues awaited with great interest if a little apprehension the task that faced us. Most of my then section recalls a letter that was read out by the registrar at one of our first section meetings. It came from a Polish lady in her 80s who lived in Warsaw. Her complaint was of her inability to obtain a telephone. If my memory serves me correctly she had written around to a number of agencies but was getting absolutely nowhere. The phone was very important to her because she was largely housebound. It did not seem the sort of case that we could deal with but, out of a simple human desire to do something, the registrar was instructed to write a letter to the Polish authorities bringing this complaint to their notice. Some few weeks later the registrar read

[4] The gradual growth in the number of cases heard before the Court under its original structure (1959-1998) can be seen by analyzing the table of cases contained in *Survey, Forty Years of Activity 1958-1998*, 26-87, available at http://www.echr.coe.int/NR/rdonlyres/66F2CD35-047E-44F4-A95D-890966820E81/0/Surveyapercus_19591998.pdf (last accessed: 27 September 2011).

[5] Protocol No. 11, *supra* note 2.

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out a further letter from this lady. It started off, "Dear Judges of the Court of Human Rights, my phone arrived this morning …." She went on to express her delight that there now existed in Europe a court that could get people their phones! She did in the circumstances appear to be correct but we did consider our remit ran a little further. Needless to say this innocent little victory revealed to everyone involved, the deep human interest that lay behind every application, even the most hopeless ones.

The great bulk of the work we did was in chambers of seven judges. The chamber of seven was drawn from a section consisting of 10 judges. The formation of seven was designed to reflect diversity in gender, geography, language and legal system. The Grand Chamber of 17 judges was also balanced to achieve diversity. Initially it dealt with the cases referred from the former Commission. After these had been disposed of, it dealt only with cases of great significance where either the section had relinquished jurisdiction or one of the parties in a chamber judgment had referred the judgment to the Grand Chamber and a panel thereof had accepted it.

Each section met once a week to consider the cases before it. The rest of the week was consumed with reading the files prepared for this weekly deliberation. Added to this was attendance at drafting committees and the other committees that do all of the administrative "donkey-work" of any large institution. The Court also operated committees of three judges who would unanimously strike out cases of obvious inadmissibility. Very soon after our arrival it began to come clear to the judges of the new Court that the much-vaunted reform of the system was very unlikely to meet the demands of a caseload that was increasing by quantum leaps on an almost daily basis. I do not wished to get bogged down in figures in this address but permit me one brief statistical aside:

In its early years the former Court of Human Rights sat only once a year. Its caseload grew slowly. In its first 18 years the Court delivered 26 judgments. In its second 18 it delivered 472. In 1999, the first year of the new Court, 177 judgments were delivered. In 2000, there were 695 judgments, there were 888 in 2001, and 844 in 2002.[6] Declarations of inadmissibility in 1999 equaled 3,520. In 2000 that figure had climbed to 6,779. In 2001 it increased to 8,992 and in 2002 to 17,866.[7]

In 2010, 38,576 applications were declared inadmissible and 1,499 judgments were delivered. At the end of 2010 140,000 allocated applications were pending before the Court. 61,300 applications were allocated to a judicial formation in 2010. Those caseload figures show every sign of continuing to increase at these dizzying levels.

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[6] European Court of Human Rights, *50 Years of Activity, The European Court of Human Rights: Some Facts and Figures,* available at: http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf, 5 (last accessed: 27 September 2011).

[7] *Id*. at 13.

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The feeling in the new Court in its early years was one of grave concern, high anxiety and a firm resolution not to panic. Things were not helped by much bitter comment on the part of the designers and backers of Protocol 11 who seemed unable to grasp that their scheme of reform had been overtaken by the caseload some years before Protocol 11 had even come into existence in 1998. The Court had to endure much criticism from even its friends and supporters who seemed to find it impossible to grasp the enormity of the caseload faced by the Court. Among the judges I recollect near unanimous regret at the loss of the former Commission and its vital filtering role. Of course, it should have been obvious in the post 1989 world that the caseload would burgeon to unprecedented levels. It is easy to be wise in hindsight, but it ought to have been obvious that the immediate absorption into the Council of Europe of almost all the former Soviet bloc states was certain to bring with it an enormous potential for violations. The states would not be liable for any complaints arising prior to their ratification but the inadequate protective structures that existed in those states was sure to give rise to an avalanche of applications. That is precisely what happened. At last count in December 2010, 40,300 applications against Russia were pending before a judicial formation of the Court. That is 28.9% of all such pending applications. By way of a 'little and large' type comparison – at the same date, Ireland had 59 cases pending. In the year 2000 however it did seem to become clear to the authorities both in the Council of Europe in Strasbourg and in the capitals of the then 42 States that made up the Council of Europe that something really had to be done.

It was determined to prepare a new protocol to the Convention. The aim was to streamline the operation of the Court with particular reference to: (a) introducing some form of filtering body to permit the Court to concentrate on the more weighty cases that would advance the cause of human rights protection in Europe; (b) allowing it to declare inadmissible applications that did not involve any significant disadvantage to the applicant as a result of the alleged violation; (c)providing some form of mechanism to allow for disposal of cases that could be easily decided on the basis of well established Convention law; and (d) providing that judges be elected to one single non-renewable term of nine years.

The negotiations that followed were something of a revelation to me. It seemed at times that the whole review process would amount to nothing, that no agreement would be forthcoming. Yet step by agonizing step there emerged Protocol 14 which, although far from what had been hoped for, was nonetheless a strong step in the right direction. By the end of the process, I had developed a great admiration for the legal diplomats who with endless patience and great effort squared circles and smoothed edges and finally somewhat miraculously produced an agreement that everyone signed. It took a number of years before the Russian Federation put aside its concerns and, being the last to ratify, brought Protocol 14 into force.

B. The Present

I have already outlined the scale of the caseload problem facing the Court today. That caseload will continue to grow – of that there is no doubt. How does the Court function today under the provisions of Protocol 14? Firstly, I think I may echo Mark Twain by saying that reports of its drowning in a sea of applications are "greatly exaggerated." What are the more obvious characteristics of the post-Protocol 14 world?

The judges will no longer be re-elected. New judges will be elected for a non-renewable term of nine years. Sitting judges in their first term have had their terms extended *ipso jure* (by operation of law) to ensure they serve at least nine years. Others' terms were extended by two years. The judges sit, as before, in a Grand Chamber of 17, in five chambers of seven, 13 committees of three and, in a new innovation, in single judge formations. The great bulk of the judgments has always been and will continue to be given by the chambers of seven. The composition of the sections is changed triennially. The most recent change was on 1 February 2011. The Grand Chamber sits to hear cases that raise serious questions arising from the application or interpretation of the Convention or issues which are considered of great importance. The Grand Chamber also hears cases relinquished by a chamber where both parties consent. Where a judgment has been given by a chamber, either party may refer it to the Grand Chamber who will re-hear the case *de novo* (from the beginning) provided a Grand Chamber panel of five judges agree to accept it.

In some ways the single judge formation is the most dramatic of the new innovations provided by Protocol 14. The single judge may deal with cases that clearly fail to meet one of the admissibility criteria. That single judge is furnished with a brief description of the application including the reasons why it is thought to be inadmissible. This note is prepared by a non-judicial *rapporteur*. If the judge agrees, the case is struck out. If not, he/she may refer it to either a Committee of three or to a Chamber. It is this single judge formation which will now carry the main burden for filtering clearly inadmissible or ill-founded applications. When one considers that these account for well over 90% of all the applications decided, one may see why it is hoped this may be the key to the future management of the caseload. It provides a judicial input in the determination of literally oceans of hopeless applications which although devoid of any possibility of success could drown the mightiest vessel.

This innovation is in its infancy but ought to work or at least make some considerable difference. The President of the Court has designated 60 experienced registry lawyers to act as non-judicial *rapporteurs*. They are answerable to the President of the Court. He has also designated 20 judges to fulfill this single judge role. They will serve in this role for one year. This system commenced on 1 June 2010 and I am reliably informed that it is working quite well. I know from my own experience on the three judge committees that dealing with these endless files of hopeless applications is a tedious drudgery and I do not envy

those judges tasked for one year with them. The same sympathy, of course, goes also to the registry lawyers. Clearly, they will shoulder a heavy burden with both functions. It of course goes without saying that a single judge may not act in a case concerning his or her own country.

The three judge committees existed under the previous Protocol 11 regime. Each of the five sections into which the judges of the Court were divided nominated a number of these committees depending on the workload they had. These committees, acting unanimously, could dispose of clearly inadmissible applications. That function remains and the single judge might well consider having one of the three committees under the new regime consider an application which he/she is not satisfied to deal with alone. However the main role expected of these three judge Committees in this new regime will be to give judgment in cases governed by well-established case law.

The decisions of the single and three judge Committees are final and binding with immediate effect. They are not susceptible to being referred to the Grand Chamber as would be the case with Chamber judgments. The national judge of the state involved is not required to sit on the three-judge committee. The Committee may however, if it wishes to do so, replace one of its members with the national judge. The ability of the national judge to read the file in the national language might, for instance be considered of some importance in particular cases. Expertise in the national law of the state concerned might also be a good reason to include the national judge.

The role of the Chambers and the Grand Chamber broadly remain the same as before. Protocol 14 however, amended Article 46, introducing a provision that allowed the Committee of Ministers to ask the Court to clarify the meaning of a judgment. It may, also, under this provision ask the Court to determine whether a state has adequately executed a judgment against it. The Committee of Ministers (being the foreign Ministers of the Council of Europe member states represented by their ambassadors) have, as before, responsibility for the execution of judgments and friendly settlements. They verify whether the state in question has taken adequate measures to comply with the Court's judgment. This provision is intended to assist the Committee of Ministers where a particular country may claim that it has actually executed the judgment but where there is some doubt as to whether it has done so. It is also expected to be helpful for the purpose of bringing pressure to bear to comply with judgments.

A further amendment made by Protocol 14 is that, where the national judge cannot for whatever reason sit in a case, there will be a new arrangement for designating a replacement or *ad hoc* judge. The member states were required to submit (and did in Ireland's case) a list of three to five names. When the need arises, the presiding judge may choose one from that list. The list submitted may contain the name of a sitting judge of the Court. The purpose of this change was to end the anomaly that a state party to a case

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would have the opportunity of nominating a judge in its own cause in the course of the proceedings where for some reason the national judge could not sit.

A further significant change introduced has been the addition of a new ground of inadmissibility in Article 35. At the outset of the negotiations of Protocol 14, the Court had argued for something akin to the power of *certiorari* as understood by the practice of the United States Supreme Court. It wished to be able to choose the cases it would hear. In this way, the limited resources of a court would be used to concentrate on cases that raised serious issues of human rights protection. It would hear as many as it possibly could but would not admit every single application for adjudication by a judicial formation. This proposal was, of course, highly controversial. Was this the end of the right of individual petition? Even if it were, was there any alternative since it was hardly possible to provide court adjudication for every applicant from a jurisdiction of over 800 million people? The form this proposal finally took when it crystallized in Protocol 14 was that an application might be rejected where an applicant had not suffered a significant disadvantage as long as respect for human rights did not require an examination of the case and provided that a domestic tribunal had considered the complaint.[8] Interestingly, so concerned were the drafters of the Protocol by this new ground of admissibility that they included the provision that only the Grand Chamber and the Chambers might apply this criterion during the first two years of operation of the Protocol – that is up until 31 May 2012. After that, the three judge Committees and the single judge may apply it. The Court has already applied this new ground of inadmissibility.[9]

Will all these changes wrought by Protocol 14 work? They will undoubtedly assist the Court in adjudicating a greater number of applications. Will this however avail in the circumstances where at present 140,000 applications are before the Court whilst 60,000 odd have been allocated to a deciding body and as we have seen in 2010, 38,500 decision

[8] The Convention for the Protection of Human Rights and Fundamental Freedoms Art. 35(3)(b), Sept 3, 1953, 213 U.N.T.S. 221 [hereinafter "ECHR"].

[9] *See* for example, Ionescu v. Romania, 51 E.H.R.R. SE7 (2010) ; Korolev v. Russia, 51 E.H.R.R. SE15 (2010); Zátkové v. Czech Republic, Eur. Ct. H.R. (2011), available in French at: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=879748&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last accessed: 27 September 2011); Holub v. Czech Republic, Eur. Ct. H.R. (2010), available at: http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=879748&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last accessed: 27 September 2011; Finger v. Bulgaria, Eur. Ct. H. R. (2011), available at: http://www.astrid-online.it/I-tempi-de/Giurisprud/CASE-OF-FINGER-v.-BULGARIA.pdf (last accessed_ 27 September 2011); Dudek v. Germany, Eur. Ct. H. R. (2011), available at: http://vlex.com/vid/case-of-dudek-v-germany-250819710 (last accessed: 27 September 2011); Fedotov v. Moldova, Eur. Ct. H. R. (2011), available at: http://vlex.com/vid/fedotov-v-moldova-284270999 (last accessed: 27 September 2011); Burov v. Moldova, Eur. Ct. H. R. (2011); Gaftoniuc v. Romania, Eur. Ct. H. R. (2011), available at: http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=67707948&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=88843&highlight= (last accessed: 27 September 2011).

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and 1,499 judgments were delivered. The figures in terms of a caseload are frankly mind-boggling. There is not a court anywhere in the World in the same league as the European Court of Human Rights is when it comes to caseload. Will it drown?

So great has been the concern that it was determined to have a serious think-in by the interested parties to consider the whole picture. This resulted in a high level conference which met at Interlaken on 18 and 19 February 2010. It adopted at the end of its deliberations a Declaration that, as it puts it, "seeks to establish a road map for the reform process towards long-term effectiveness of the Convention system."[10] Ireland was present at this conference and joined in the adoption of this Declaration. To give but the broadest of outlines, it seems to me that the Declaration demonstrates a powerful and welcome determination on the part of the member states to deal with the problems wrought by the incredible success of the Convention system in Europe since 1953. It is always worth reaffirming that the problems the system faces today are in fact the problems of success not of failure. The parties to the Declaration do indeed acknowledge that success and the contribution of the Court to it. They emphasize the subsidiary nature of the Court in Strasbourg and the fundamental role which national authorities, specifically government, parliament and courts must play in guaranteeing and protecting human rights at a national level. The Court itself is required to take fully into account its subsidiary role in the interpretation and application of the Convention. The subsidiarity principle should be strengthened. In short, the national authorities should take even more responsibility for the Convention than they have heretofore. They should ensure that every person with an arguable claim that their Convention rights have been violated has an effective remedy before a national authority.[11]

In its action plan, the Declaration firstly reaffirms the principle of the right to individual petition.[12] The Declaration urges the Court to use the admissibility criteria rigorously and to make maximum use of the procedural tools at its disposal. The Committee of Ministers are urged to consider measures that would enable the Court to concentrate on adjudicating well-founded cases within a reasonable time, in particular, those alleging serious violations.[13] It seems to me that in these provisions the member states are urging the Court to use to the full the new arrangements in such a way that the Chambers and Grand Chamber will spend their limited time resources in adjudicating cases of real weight

[10] *Interlaken Declaration from the High Level Conference on the Future of the European Court of Human Rights 19 February 2010*, available at http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf, 2.

[11] *Id*. at 3.

[12] *Id*.

[13] *Id.*

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and significance and which are likely to advance the course of human rights protection in Europe. In this way the ECtHR may be assisted to return to the pre-Protocol 11 scenario in which the Commission acted as a filter allowing the Court concern itself with the very significant cases that established its reputation in the first place. The Declaration perhaps signals a new approach where it urges member states to take into account the developing case law of the Court with a view to applying it to similar situations that might arise in their own countries. In short, a more proactive role in which the judgments of the Court may have effect on states other than those involved in the case in question.

Addressing the problem of filtering out hopeless cases, the Declaration urges the Court to put in place in the short term a mechanism within the existing Court for effective filtering.[14] This the Court has already done by utilizing the one judge formation. The Declaration implicitly acknowledges the limitations of that formation to solve a problem growing bigger by the day where it recommends the Committee of Ministers to consider setting up a filtering mechanism within the Court but going beyond the one judge procedure.[15] This is definitely a space worth watching.

Addressing the Court the Declaration urges more deference to the domestic courts in relation to questions of fact or national law.[16] It is a little odd as a recommendation since that is something the Court has always done to the fullest extent it can. The Court is also urged to take fully into account its subsidiary role in the interpretation and application of the Convention.[17] This also rings a little oddly in the ear of one who sat on the Court for eight and a half years since the Court has repeatedly stated just exactly that.

The Declaration also seems to encourage the Court to make use of the new provision in Protocol 14 to request the Committee of Ministers to reduce the size of the sections from seven to five.[18] This is a proposal that I think raises some troubling questions of representation. The sections have nine or ten judges at the moment in each. These sections are carefully balanced to take account of geography, gender, legal systems and language. Reducing the number of judges in the sections reduces the representation of each section individually. It is a sensitive issue and not so obvious a solution to the caseload as it might seem. There are only 47 judges – no matter what formation they are in. They can only do so much. Sitting in formations of one, three, seven and seventeen will create a great deal of pressure on an already overburdened court.

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[14] *Id*. at 4.

[15] *Id*. at 6.

[16] *Id*. at 1.

[17] *Id*.

[18] *See* ECHR art. 26.2, Sept 3 1953, 213 U.N.T.S. 221, as amended by Protocol No. 14.

The Declaration calls upon the Committee of Ministers to examine the possibility of introducing a new more simplified method of amending the Convention in relation to organizational issues. This desire springs from the experience had in negotiating and ratifying Protocol 14 in the apparently endless wrangling involved in its negotiations phase when I feared, and I am sure that I was not alone, that the project would dissolve in chaos. Only dogged persistence and considerable creativity on the part of those involved managed to produce anything. I considered it something of a miracle that anything so substantial was in the end agreed. No doubt it is the dream that there may be found some less fractious or complicated method than that which results when 47 states must negotiate such controversial and complex issues. I hope very much this will come about. If nothing else, it would ease the nerves of concerned bystanders.

Finally, in relation to the Declaration, the Conference demonstrated its serious intent in setting out quite a formidable and detailed timetable for implementation of its recommendations. Real determination to address the problems of the Court's burgeoning caseload appears in these proposals. They contemplate a further full review of the whole structure.[19] This goes far beyond the papering over of the cracks that at times seemed to characterize so much of the earlier efforts to address the Court's difficulties.

C. The Future

The need for positive optimism in a troubled world goes without saying. There seems at times so much that might sink the brightest heart - when it may appear that dark clouds cover all. Sometimes in Strasbourg, reading the files that recounted the most terrible stories of man's inhumanity to man, one might have felt crushed by the enormity of it all. Yet in almost every case one could find some element of personal heroism that gave witness to the unsinkable humanity within us all. I never lost my sense of positive optimism while I was in Strasbourg. I always felt that the Court was a glowing bright beacon of hope for millions. That beacon glows even brighter I think since the commencement of the web-casting project of broadcasting on the Internet the public hearings of the Court. Since 2007 it has been possible to see on the Internet a full video recording of those hearings. The broadcast is not live. This is in order to give the Court time to consider whether any part of the hearing should not be broadcast. This would be, for instance, because of fears for the safety of persons inadvertently identified. The video is available on the afternoon of the hearing. Thus, throughout the entire 47 countries that comprise the Council of Europe, where there is access to the Internet, ordinary people may see their governments called to account to answer their individual complaints before an international tribunal. Nothing like

[19] *See supra*, note 10.

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this has ever happened before. I am very glad to note, as one may see from the page on the site where the video is played, that this web-casting project was funded by Irish Aid, the Government of Ireland's agency. It is nice in these very difficult days for Ireland to know that we have made and, I hope will continue to make, this signal contribution to spreading the gospel of human rights.

I believe firmly that the future of the Court is secure. This firm conviction is based not just upon the new provisions of Protocol 14 nor on the strong commitment to further reform proposed by the Interlaken Declaration. It is based upon a very firm view I developed during the years I was still working on the Court in Strasbourg. I believe the Court by the mid-1970s with cases such as the interstate case of *Ireland v. the United Kingdom*[20] had reached a point of critical mass. From that time on, the Court became undeniably a central part of the European judicial architecture. There will be no drowning no matter how large the caseload grows. The demand for the Court's continued presence is too overwhelming to allow of its disappearance. The Court, I am convinced, will do those cases it can. If it cannot do all the cases that come to it then that is a great pity but an inevitable reality. No single court can handle all the applications from such a colossal jurisdiction. One does not need to be a great mathematician to know that 800 million into one will not go. By concentrating, as it does and will increasingly do under the new arrangements, on those cases which involve weighty issues of law that can advance the cause of human rights, the Court will continue to dominate the world of human rights long into the future.

As we see from the Interlaken Declaration, a central part of the strategy for the future is the involvement of the domestic authorities. Government, parliament and courts are urged to participate fully in the process of interpretation and implementation of the Convention. The Court and the member states are urged to have ever-greater reference to the principle of subsidiarity. By this the Court means that states should take on to themselves as much responsibility for interpretation and implementation of the Convention as they possibly can. Strasbourg, as it has always said, is a supervisory organ. It is the final authoritative voice on the interpretation of the Convention. On this principle, the primary responsibility lies on the individual states which include the courts.

The Court in Strasbourg will deal with any problems that arise. The principle is based upon Article 53 which provides that the Convention is a code of minimum standards. It is made possible because the judgments of the Court in Strasbourg are not binding *erga omnes* (toward all). As provided in Article 46, they bind only the parties to the case in question. As a result the doctrine of the margin of appreciation has been allowed to develop. This doctrine provides that the individual state will be granted a certain measure of discretion in regard to the manner in which certain rights may be limited. This margin is not unlimited by any means and Strasbourg will always retain the final authoritative word. However it

[20] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A, 1978).

allows states to consider issues of proportionality, reasonableness and necessity. These are concepts that are essentially local in their nature and domestic authorities, notably the courts, are normally considered to be in the best position to make these judgments. Strasbourg will rarely intervene in genuine assessments of this sort by domestic courts.

So how can Ireland help in this regard? Clearly the Interlaken Declaration urges us to take as much responsibility for the Convention as we possibly can. Where are we now in this regard? Ireland in the European Convention on Human Rights Act 2003[21] chose a form of incorporation of a very narrow nature. Subsequent interpretation may have narrowed even further the nature of this incorporation. It must be noted that it is Ireland's undoubted prerogative to do so. The member states are only required by Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined therein. How they go about doing that is for each country to decide. Ireland was not even obliged to go as far as it has in its choice of incorporation. As a member of the Irish judiciary, I accept and respect the choice made as to the manner of incorporation. Until directed otherwise by either the *Oireachtas* (The Irish bicameral legislature) or the Irish Supreme Court I will work strictly within its currently perceived limits. However, in the context of a national discussion that may be considered as required by the Interlaken Declaration, I think I may be permitted a few comments on the possibilities that lie before us.

It seems to me that the narrower the form of incorporation, the greater the role of Strasbourg. That Court wishes us to do as much as we can for ourselves. So also do the member states as outlined in the declaration. However, so long as we disclaim the opportunity to identify and apply Convention rights ourselves and, where appropriate, even go beyond the Strasbourg jurisprudence in doing so, much that might be done by our own judiciary will be left to the Strasbourg judges. It is worth recollecting that in the Chamber, the judge elected in respect of Ireland is one of seven judges. In the Grand Chamber, she is just one of 17. Were Irish judges to engage in the identification of rights arising from the Convention, they would then inevitably proceed to consider the classical issues of proportionality, reasonableness and necessity in order to determine the case. As noted above, where the national courts engage in such considerations, Strasbourg will rarely intervene almost always accepting the national courts assessment of these essentially localized issues. In doing so they would undoubtedly draw upon the rich vein of Irish judicial experience. When they do not, it is the Strasbourg judges who will do that exercise. They will do so as best they can but each will be drawing upon their own experience and legal cultural background.

[21] Due to Ireland's dualist approach to international law, ratification of a treaty alone is not sufficient for its obligations to become incorporated into national law. Rather, domestic legislation was required to incorporate the ECHR into the Irish national legal system. This was achieved by The European Convention on Human Rights Act 2003. *See generally*, FIONA DE LONDRAS & CLIONA KELLY, EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 5-9 (2010).

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It seems to me that the Irish Supreme Court is well equipped to engage in such considerations. Its work in developing our body of fundamental rights from the Constitution over the last half century surely provides a deep well of knowledge and experience that ultimately could benefit not just us but our fellow Europeans in developing convention jurisprudence. Already judgments of the German Federal Constitutional Court and of the English Court of Appeal have been cited in judgments of the European Court of Human Rights.[22] The door has always been open in Strasbourg to the views of others, even to non European courts: judgments of the U.S. Supreme court have been cited,[23] and judgments of the Canadian Supreme Court have played a major part in developing the doctrine of proportionality in Europe.[24]

Were we able to take more responsibility for interpreting and implementing the Convention in Ireland we would only be doing what Strasbourg and the other member states as expressed in the Interlaken declaration would like us to do. Indeed Ireland itself, as noted above, is a party to that declaration and the plan of action referred to therein. The right and indeed, in the light of the Interlaken declaration, the obligation to take more responsibility for interpreting and implementing the Convention may perhaps even be considered a part of our national sovereignty. If this is so, it seems Ireland has chosen in this regard a position of sovereignty declined.

It is not for me to advocate any particular approach. I confine myself to observations on what seems to me to be the consequences of our form of incorporation. With regard to the Convention, we are dealing with a relatively new source of law. In any form of incorporation there are sure to be many knotty problems that will arise. I am sure this is an area that will receive over the next few years much reflection and consideration. I intend to watch this space carefully and hopefully.

[22] The German Federal Constitutional Court's judgment was mentioned, for example, in Lautsi and Others v. Italy, Eur. Ct. H.R. (2011), available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=lautsi&sessionid=79286733&skin=hudoc-en (last accessed: 27 September 2011). The judgment of the English Court of Appeal was quoted in Al-Saadoon and Mufdhi v. the United Kingdom, 51 E.H.R.R. 9 (2010).

[23] *E.g.* Jalloh v. Germany, Eur. Ct. H. R., 44 E.H.R.R. 32 (2007); Vo v. France, Eur. Ct. H. R., 40 E.H.R.R. 12 (2005).

[24] *E.g.* Pretty v. United Kingdom, 427 Eur. Ct. H. R. 2002.

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